No. 79-1905

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In the Supreme Court of the United States

OCTOBER TERM, 1979

SEA ISLAND BROADCASTING CORPORATION OF S.C., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming a broadcast license revocation order that was based on clear and convincing evidence simply because the Federal Communications Commission had unsuccessfully urged that only a preponderance of the evidence should be required as a general rule.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Collins Securities Corp. v. *SEC*, 562 F.2d 820 ..... 3, 5

Steadman v. *SEC*, cert. granted, No. 79-1266 (Apr. 28, 1980) 6

Woodby v. *INS*, 385 U.S. 276 6

Rule:

47 C.F.R. 73.1205 1

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The report of the Federal Communications Commission on limited remand from the court of appeals (Pet. App. B) is reported at 69 F.C.C. 2d 1796. The Commission's original decision (Pet. App. C) is reported at 60 F.C.C. 2d 146, and its memorandum opinion and order denying reconsideration (Pet. App. D) is reported at 64 F.C.C. 2d 721. The initial decision of the administrative law judge (Pet. App. E) is reported at 61 F.C.C. 2d 937.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1980. A petition for rehearing was denied on March 5, 1980. The petition for a writ of certiorari was filed on June 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 24, 1976, after a full evidentiary hearing, the Federal Communications Commission decided (Pet. App. 19a-30a) to revoke petitioner's license for standard radio station WSIB, Beaufort, South Carolina. The Commission's action was based on evidence establishing that petitioner had violated Commission regulations that prohibit the issuance of any bill "which contains false information concerning the amount actually charged by the licensee for the broadcast advertising * * * or which misrepresents the quantity of advertising actually broadcast * * *." 47 C.F.R. 73.1205. The Commission stated (Pet. App. 30a):

> Our decision to revoke [petitioner's] license is based primarily on the fact that [petitioner] has shown a classic pattern of making deliberate

misrepresentations and other misleading and deceptive statements to us when it believed it could effectively conceal suspected wrongdoing. Further, the kinds of fraudulent billing engaged in by [petitioner] were serious and reinforce our conclusion to revoke [petitioner's] license. In short, the effective regulation of the communications industries under our jurisdiction is premised on our ability to depend on the accuracy and truthfulness of our licensee's representations to us. Once we find that we cannot rely on a licensee's representations to us, the only suitable penalty is revocation of the license.

The evidence showed that petitioner had participated with a local merchant in a scheme to defraud a national advertiser with whom the merchant had a cooperative advertising agreement in 1972. Pursuant to the scheme, petitioner submitted to the national advertiser invoices which did not account for rebates that petitioner had paid to the merchant, and thus overstated the price of the advertising. Because the national advertiser had agreed to pay 50% of the amount invoiced (Pet. App. 21a & n.4), the effect of this scheme was to cause the national advertiser to pay an inflated price for the advertising, to the benefit of petitioner and the merchant. Petitioner also conceded at the hearing that it had issued invoices to national cooperative advertisers, which misrepresented the types of advertising that were broadcast (Pet. App. 21a).

Moreover, the record showed that petitioner had made misrepresentations and misleading statements to the Commission during its investigation. For instance, after the Commission had advised petitioner that it was investigating possible fraudulent billing practices, Charles E. Bell, Sr., petitioner's president and sole shareholder, wrote to the Commission on October 3, 1973, stating that his station's billing practices had been "carefully

reviewed," and that he had been unable to find an explanation from the employee who had made the bookkeeping entries. He further stated that that employee was "not a trained bookkeeper," and he told the Commission that typewritten ledger sheets—rather than the handwritten ledger to which the Broadcast Bureau had referred—were used for billing (Pet. App. 5a, 24a). When Bell later testified, however, he stated that he had sent the October 3rd letter without questioning the bookkeeper (his wife), the sales and station manager (his son), or the merchant whose account had been the subject of the Broadcast Bureau's inquiry. Moreover, he had not inspected the typewritten ledger sheets to which he had referred in his letter (*ibid.*).

2. On June 24, 1976, the Commission entered its revocation order. On May 20, 1977, the Commission denied reconsideration, stating that the record "overwhelmingly supports" the factual findings supporting that order (Pet. App. 19a-30a, 32a). Three months later, while petitioner's appeal was pending in the United States Court of Appeals for the District of Columbia Circuit, that court decided *Collins Securities Corp.* v. *SEC*, 562 F.2d 820 (D.C. Cir. 1977), in which it held that the SEC's revocation of a broker-dealer license must be based on "clear and convincing evidence." Petitioner subsequently argued in its reply brief in the court of appeals (at 11-14) that the court's holding in *Collins* should also govern the revocation of a broadcast license. After oral argument, the court remanded the record for the limited purpose of asking the Commission to state what standard had been applied in deciding petitioner's case, and to advise the court with respect to whether the Commission believed that the *Collins*

standard should be applied in the broadcast license context (Pet. App. 49a-50a).

The Commission thereafter reported its view that broadcast revocation proceedings should be governed by the "preponderance of the evidence" test. The Commission also stated that it had decided petitioner's case under that test but, referring to its earlier conclusion that "the evidence against [petitioner] was overwhelming," the Commission noted that the "clear and convincing" test had been satisfied in any event (Pet. App. 14a & n.3).

The court of appeals held that the Commission's revocation of a broadcast license must be supported by evidence that is "clear and convincing" (Pet. App. 10a). Based on the Commission's representation and the court's own "particularly careful" review of the record, the court of appeals concluded that "the Commission at all times considered the proof of [petitioner's] derelictions to be clear and convincing" (Pet. App. 12a). Therefore the court of appeals affirmed.

ARGUMENT

Petitioner contends that the court of appeals erred in affirming the Commission's revocation of petitioner's broadcast license, rather than remanding the case to the Commission. Petitioner bases that contention on the premise that the Commission applied an erroneous standard of proof, which it subsequently defended on appeal. Petitioner's contention lacks merit, however, because the administrative record clearly demonstrates that the Commission viewed the evidence as satisfying the "clear and convincing" standard in any event.

While the Commission argued as a general proposition that revocation proceedings should be governed by a "preponderance" rather than a "clear and convincing" standard of proof, the Commission has consistently taken

the position that the revocation of petitioner's license was warranted under either test. Petitioner claims that the Commission's assertion is supported only by a "gratuitous representation [made] during the process of judicial review" (Pet. 8). On the contrary, the Commission's evaluation of the evidence was unequivocal both when it made its initial determination and when it denied reconsideration, both of which occurred before the court of appeals applied the "clear and convincing" test in the context of broker-dealer license revocations, and before that court indicated by its limited remand order (Pet. App. 49a-50a) that it might impose the same test in the broadcast license revocation context. Prior to the court of appeals' decision in this case, it was not obvious that "clear and convincing" proof was required in these circumstances. It is not surprising, therefore, that the Commission did not specifically state that the evidence supporting the revocation of petitioner's license was "clear and convincing." Nonetheless, the Commission expressly stated in its initial revocation decision that "[t]he record in this proceeding is *replete* with examples of *deliberate* misrepresentations by [petitioner's] owner and officers * * *" (Pet. App. 21a; emphasis added). Moreover, when the Commission denied reconsideration in May 1977, three months before *Collins* was decided, it stated that its conclusions were "*overwhelmingly support*[*ed*]" by the record (Pet. App. 32a; emphasis added). In other words, the administrative record, as it existed before the Commission responded to the court of appeals' questions, could not have demonstrated more clearly that the

Commission believed that the evidence supporting the revocation was sufficient under either test.[1]

As the court of appeals observed, the existence of substantial evidence supporting the agency's revocation decision is "abundantly clear" (Pet. App. 6a-7a). In these circumstances, since petitioner does not and could not claim that it was denied an opportunity to present evidence in its favor or to explain the evidence against it, further administrative proceedings were not required.

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[1]Petitioner's assertion (Pet. 17) that this case should be remanded to the Commission under *Woodby* v. *INS*, 385 U.S. 276 (1966), is ill-founded. Remand was necessary in *Woodby* only because it was not obvious, as it is here, that the evidence satisfied the appropriate standard (*id.* at 279). Because the revocation of petitioner's license was justified under either standard, the suggestion (Pet. 18) that the Court consider this case together with *Steadman* v. *SEC*, cert. granted, No. 79-1266 (Apr. 28, 1980), is likewise without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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